Ketua Setiausaha Kementerian Dalam Negeri & Anor v Salconmas Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-01(NCC)-158–03 OF 2020
MOHAMAD ZABIDIN, HADHARIAH SYED ISMAIL AND SUPANG LIAN JJCA
15 JULY 2022

Arbitration — Appeal against the arbitration award — Res judicata — Whether the issue on the appointment of the arbitrator was res judicata — Whether HCJ erred in holding that the appellants had waived the right to challenge the arbitral tribunal's composition because the appellants did not raise the said issue before the arbitrator — Whether erred in holding the appellants had failed to prove that the final award was in conflict with public policy — Arbitration Act 2005 ss 7,18, 37(1)(b(ii)

This was an appeal against the High Court Judge ('HCJ') decision in dismissing appellants' application to set aside the arbitral inal Aaward. On 30 October 2004, the appellants together with one company and the respondent entered into a Privatisation Agreement ('the agreement') to develop a new General Operations Force (Pasukan Gerakan Am (PGA) Complex in Sibu and Limbang with the contract sum of RM68,100,000 through land swap ('the project'). It was not in dispute that the respondent had failed to fulfil the condition precedent. Nine years later, the appellants terminated the agreement through a letter dated 20 August 2013. The appellants informed the respondent that the agreement was unenforceable and no longer binding on the parties as the respondent had failed to fulfill the condition precedent. The respondent disputed the termination and wrote a letter to the appellants dated 3 October 2014 requested the formation of a Dispute Resolution Committee under cl 27 of the agreement to settle the dispute through arbitration. However, the appellants through a letter dated 6 January 2015 rejected the request on reason that the agreement was no longer effective and that all the clauses were no longer applicable and not binding on the parties. The respondent's solicitor then wrote a letter dated 12 December 2016 to the appellants to refer the dispute to arbitral tribunal and proposed En Ameir bin Hassan as sole arbitrator. There was no reply by the appellants to the said letter. Therefore, in default of parties' agreement on an arbitrator, cl 28.2 would require any party to make an application to the Director of AIAC for the nomination of the arbitrator. It was an undisputed fact that no reference was made to the KLRCA in respect of the nomination of an arbitrator. Instead, on 13 February 2017, the respondent filed Originating Summons at Kangar High Court, Perlis ('Kangar first OS') applying for an order to refer the dispute to

arbitral tribunal and to appoint En Ameir bin Hassan as sole arbitrator. On 21 April 2017, the learned judicial commissioner ('JC') allowed the respondent's application ('Kangar first order'). The appellants did not appeal against the Kangar first order. However, on 30 January 2018, the appellants filed originating summons at the Kuala Lumpur High Court (KL first OS) and the Kuala Lumpur High Court Judge allowed the appellants' application ('KL Order') and the arbitral proceeding was put to a stop. The respondent then filed originating summons ('Kangar second OS') and the Kangar High Court allowed the respondent's application ('Kangar second order'). The appellants appealed against the Kangar second order to the Court of Appeal. The appeal was dismissed on 8 November 2018. There was no further appeal by the appellants. The appellants and the respondent proceeded with the arbitral proceeding and on 9 August 2019, the arbitrator issued a final award in favour of the respondent. Aggrieved by the said final award, the appellants applied via originating summons at the Kuala Lumpur High Court ('KL second OS') to set aside the final award under s37 of the Arbitration Act 2005 ('the Act'). The High Court dismissed the appellant's claim. The issues in this appeal were: (a) whether the issue on the appointment of the arbitrator was res judicata; (b) whether the HCJ erred in holding that the appellants had waived the right to challenge the arbitral tribunal's composition because the appellants did not raise the said issue before the arbitrator under s 18 of the Act; and (c) whether the HCJ erred in holding the appellants had failed to prove that the final award was in conflict with public policy.

Held, dismissing the appeal:

(1) The court agreed with the respondent that the issue on legality of the arbitrator's appointment was res judicata. The appellants had raised and argued the appointment issue three times ie in the KL first OS, the Kangar second OS and in the Court of Appeal. There was no merit in the appellants' contention that in all these previous suits, the court never determined the issue that the arbitrator's appointment was not in accordance with cl 28.2 of the agreement. To the contrary, there was a contravention of cl 28.2 of the agreement formed the foundation of the appellants' application to set aside the Kangar first order. It was found that after the final award was issued, the appellants filed KL second OS to set aside the final award. Again, for the fourth time, the appellants raised the issue on the arbitrator's appointment giving the same reason that was raised in the KL first OS, Kangar second OS and in the Court of Appeal. The court also found that the KL second OS was indeed not pleaded. The HCJ had acted beyond her jurisdiction by deciding on matter that was not pleaded. Therefore, the HCJ's decision that res judicata did not apply on the issue of the arbitrator's appointment was an error of law and was set aside (see paras 28–29 & 34)

(2) It was a trite law that any objection pertaining to the arbitrator's appointment and his jurisdiction must be raised before the arbitrator. The High Court in Kangar second OS had held that any challenge to the arbitrator's jurisdiction must be made before the arbitrator under s 18(1) of the Act. The decision in the Kangar second OS was upheld by the Court of Appeal. On the facts and the law, it was clear that the appellants had not complied with ss 7 and 18 (1) of the Act ie to raise any objection before the arbitrator. Therefore, the learned HCJ did not err in deciding that due to the non-compliance with these provisions of the Act, the appellants had waived their right to object on the arbitrator's jurisdiction in the KL second OS. Accordingly, no merit in the second issue and the appeal on this ground must fail (see paras 40 & 42).

(3) The arbitrator was the master of facts and that the court had no jurisdiction to set aside an award on the ground of error of fact or law on the face of the award. The court found that the learned HCJ had not erred in her finding that the element of 'conflict with public policy' was not satisfied in this case. As rightly submitted by the respondent, the appellants had failed to explain in what way the Final Award was said to create patent or substantial injustice or was manifestly unlawful and unconscionable to the extent of conflicting against the public policy in Malaysia. The appellants had also failed to prove that the most basic notions of morality and justice would be offended by the award and that the conflict was something injurious to the public good in Malaysia. For these reasons, there was no merit in the issue raised by the appellants (see paras 47 & 50).

[Bahasa Malaysia summary

Ini merupakan rayuan terhadap keputusan Hakim Mahkamah Tinggi ('HMT') yang menolak permohonan perayu untuk mengenepikan final award timbang tara. Pada 30 Oktober 2004, perayu dengan satu syarikat dan responden telah memeterai Perjanjian Penswastaan ('perjanjian tersebut') untuk membangunkan Kompleks Pasukan Gerakan Am ('PGA') yang baru di Sibu dan Limbang dengan jumlah kontrak sebanyak RM68,100,000 melalui 'penukaran tanah' ('projek tersebut'). Adalah tidak dipertikaikan bahawa responden telah gagal memenuhi syarat yang ditetapkan. Sembilan tahun kemudian, perayu telah menamatkan perjanjian tersebut melalui surat bertarikh 20 Ogos 2013. Perayu memaklumkan kepada responden bahawa perjanjian tersebut tidak boleh dikuatkuasakan dan tidak lagi mengikat pihak-pihak kerana responden telah gagal memenuhi syarat yang ditetapkan. Responden mempertikaikan penamatan tersebut dan menulis surat kepada perayu bertarikh 3 Oktober 2014 meminta pembentukan Jawatankuasa Penyelesaian Pertikaian di bawah kl 27 perjanjian untuk menyelesaikan pertikaian tersebut melalui timbang tara. Bagaimanapun, perayu melalui surat bertarikh 6 Januari 2015 menolak permohonan tersebut atas alasan perjanjian

tersebut tidak lagi berkuat kuasa dan semua klausa tidak lagi terpakai dan tidak mengikat pihak-pihak. Peguam cara responden kemudian menulis surat bertarikh 12 Disember 2016 kepada perayu untuk merujuk pertikaian tersebut kepada tribunal timbang tara dan mencadangkan En Ameir bin Hassan sebagai penimbang tara tunggal. Tiada jawapan daripada perayu terhadap surat tersebut. Oleh itu, sekiranya gagal mencapai persetujuan pihak-pihak melalui penimbang tara, kl 28.2 memerlukan mana-mana pihak untuk membuat permohonan kepada Pengarah AIAC untuk pencalonan penimbang tara. Adalah tidak dipertikaikan bahawa tiada rujukan dibuat kepada KLRCA berkenaan dengan pencalonan penimbang tara. Sebaliknya, pada 13 Februari 2017, responden telah memfailkan saman pemula di Mahkamah Tinggi Kangar, Perlis ('SP pertama Kangar') memohon perintah untuk merujuk pertikaian tersebut kepada tribunal timbang tara dan melantik En Ameir bin Hassan sebagai penimbang tara tunggal. Pada 21 April 2017, pesuruhjaya kehakiman ('PK') membenarkan permohonan responden ('perintah pertama Kangar'). Perayu tidak merayu terhadap perintah pertama Kangar. Walaubagaimanapun pada 30 Januari 2018, perayu memfailkan Saman Pemula di Mahkamah Tinggi Kuala Lumpur ('SP pertama KL') dan Hakim Mahkamah Tinggi Kuala Lumpur membenarkan permohonan perayu ('perintah KL') dan prosiding timbang tara tersebut dihentikan. Responden kemudian memfailkan saman pemula ('SP Kedua Kangar') dan Mahkamah Tinggi Kangar membenarkan permohonan responden ('perintah kedua Kangar'). Perayu telah merayu terhadap perintah kedua Kangar tersebut ke Mahkamah Rayuan. Rayuan tersebut ditolak pada 8 November 2018. Tiada lagi rayuan difailkan oleh perayu. Perayu dan responden meneruskan prosiding timbang tara tersebut dan pada 9 Ogos 2019, penimbang tara mengeluarkan Final Award yang memihak kepada responden. Terkilan dengan Final Award tersebut, perayu memohon melalui Saman Pemula di Mahkamah Tinggi Kuala Lumpur ('perintah kedua KL') untuk mengenepikan Final Award di bawah s 37 Akta Timbang Tara 2005 ('Akta tersebut'). Mahkamah Tinggi menolak tuntutan perayu. Isu-isu dalam rayuan ini ialah: (a) sama ada isu mengenai pelantikan penimbang tara adalah res judicata; (b) Sama ada HMT terkhilaf dalam memutuskan bahawa perayu telah mengenepikan hak untuk mencabar komposisi tribunal timbang tara kerana perayu tidak membangkitkan isu tersebut di hadapan penimbang tara di bawah s 18 Akta tersebut; dan (c) sama ada HMT telah terkhilaf ketika memutuskan perayu gagal membuktikan bahawa final award adalah bercanggah dengan dasar awam.

Diputuskan, menolak rayuan:

(1) Mahkamah bersetuju dengan responden bahawa isu mengenai keesahan pelantikan penimbang tara adalah res judicata. Perayu telah membangkitkan isu pelantikannya sebanyak tiga kali iaitu dalam SP pertama KL, SP Kedua Kangar dan di Mahkamah Rayuan. Tiada merit dalam hujahan perayu bahawa dalam semua saman pemula sebelum ini,

mahkamah tidak pernah menentukan isu bahawa pelantikan penimbang tara tidak mengikut kl 28.2 perjanjian tersebut. Sebaliknya, terdapat pelanggaran kl 28.2 perjanjian tersebut membentuk asas permohonan perayu untuk mengenepikan perintah pertama Kangar. Didapati bahawa selepas Final Award diberikan, perayu memfailkan SP Kedua KL OS untuk mengenepikan Final Award. Sekali lagi, buat kali keempat, perayu membangkitkan isu mengenai pelantikan penimbang tara dengan memberikan alasan yang sama yang dibangkitkan dalam SP pertama KL, SP Kedua Kangar dan di Mahkamah Rayuan. Mahkamah juga mendapati SP Kedua KL tidak diplidkan. HMT telah bertindak di luar bidang kuasanya dengan memutuskan perkara yang tidak diplidkan. Oleh itu, keputusan HMT bahawa res judicata tidak terpakai dalam isu pelantikan penimbang tara adalah kesilapan undang-undang dan harus diketepikan (lihat perenggan 28–29 & 34).

(2) Adalah menjadi undang-undang mantap bahawa apa-apa bantahan yang berkaitan dengan pelantikan penimbang tara dan bidang kuasanya mesti dibangkitkan di hadapan penimbang tara. Mahkamah Tinggi di SP Kedua Kangar telah memutuskan bahawa sebarang cabaran terhadap bidang kuasa penimbang tara mesti dibuat di hadapan penimbang tara di bawah s 18 (1) Akta tersebut. Keputusan dalam SP Kedua Kangar tersebut dikekalkan oleh Mahkamah Rayuan. Menurut fakta dan undang-undang, adalah jelas bahawa perayu tidak mematuhi ss 7 dan 18 (1) Akta tersebut iaitu mengemukakan sebarang bantahan di hadapan penimbang tara. Oleh itu, HMT tidak terkhilaf ketika memutuskan bahawa disebabkan ketidakpatuhan terhadap peruntukan Akta ini, perayu telah mengenepikan hak mereka untuk membantah bidang kuasa penimbang tara dalam SP Kedua KL. Oleh itu, tiada merit dalam isu kedua dan rayuan atas alasan ini tidak harus dibenarkan (lihat perenggan 40 & 42).

(3) Penimbang tara adalah penilai fakta dan bahawa mahkamah tidak mempunyai bidang kuasa untuk mengenepikan award atas alasan kesilapan fakta atau undang-undang. Mahkamah mendapati HMT tidak terkhilaf dalam dapatannya bahawa elemen 'bercanggah dengan dasar awam' tidak dipenuhi di dalam kes ini. Seperti yang dihujahkan oleh responden, perayu telah gagal menjelaskan Final Award dikatakan mewujudkan ketidakadilan yang besar atau menyalahi undang-undang dan bercanggah dengan dasar awam di Malaysia. Perayu juga gagal membuktikan bahawa terdapat anggapan pencabulan moral dan keadilan akibat award tersebut dan ianya boleh menjejaskan kepentingan awam di Malaysia. Atas sebab-sebab ini, tiada merit di dalam isu yang dibangkitkan oleh perayu (lihat perenggan 47 & 50).]

Cases referred to

Aseambankers Malaysia Bhd & Ors v Shencourt Sdn Bhd & Anor [2014] 4 MLJ 619; [2014] 2 CLJ 773, CA (refd)
Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd [1995] 3 MLJ 189, SC (refd)
Dato' Sivananthan a/l Shanmugam v Artisan Fokus Sdn Bhd [2016] 3 MLJ 122; [2015] 2 CLJ 1062, CA (refd)
Far East Holdings Bhd & Anor v Majlis Ugama Islam dan Adat Resam Melayu Pahang and other appeals [2018] 1 MLJ 1; [2018] 1 CLJ 693, FC (refd)
Instantcolor System Sdn Bhd v Inkmaker Asia Pacific Sdn Bhd [2017] 2 MLJ 697, FC (refd)
Jan De Nul (Malaysia) Sdn Bhd & Anor v Vincent Tan Chee Yioun & Anor and other cases [2016] MLJU 914; [2019] 1 CLJ 1, HC (refd)
Press Metal Sarawak Sdn Bhd v Etiqa Takaful Bhd [2016] 5 MLJ 417, FC (refd)

Legislation referred to

Arbitration Act 2005 ss 7, 8, 13(6), (7), 14, 15, 18, 18(1), 23, 34, 37, 37(1)(b)(ii)

Appeal from: *Ketua Setiausaha Kementerian Dalam Negeri & Anor v Salconmas Sdn Bhd* [2020] MLJU 476 (High Court, Kuala Lumpur)

Zureen Elina bt Mohd Dom (with Nur Ezdiani bt Roseb and Nurul Atiqah bt Azizan with her) (Attorney General's Chambers) for the appellants.
Zambri bin Ibrahim (Zamri Ibrahim & Co) for the respondent.

Hadhariah Syed Ismail JCA (delivering judgment of the court):

INTRODUCTION

[1] The appeal by the appellants ('the plaintiffs') is against the decision of the High Court dated 14 February 2020, in dismissing the appellants' application to set aside the arbitral final award with costs of RM10,000.

[2] We heard the appellants' and the respondent's submissions on 29 September 2021 and unanimously dismissed the appeal.

BACKGROUND FACTS

[3] On 30 October 2004, the appellants together with one company named Sykt Tanah dan Harta Sdn Bhd and the respondent ('defendant') entered into a privatisation agreement ('the agreement') to develop a new general operations force ('Pasukan Gerakan Am (PGA)') Complex in Sibu and Limbang with the contract sum of RM68,100,000 through land swap ('the project').

[4] The agreement is conditional upon the respondent fulfilling the condition precedent stipulated in cl 2 of the agreement which reads as follows:

> 2. CONDITION PRECEDENT
>
> 2.1 This Agreement is conditional upon the Company's fulfilment of the following conditions precedent:-
>
> (a) The Company shall prior to the commencement date acquired Project Land 2B at its own risks, costs and expenses; and
>
> (b) Submit to the Government the appropriate documents evidencing to the satisfaction of the Government that the company has fulfilled the condition specified in clause
>
> 2.1 (a) above;
>
> Within six (6) months from the Execution Date.
>
> 2.2 ... In the event the company fails to transfer Project Land 2B within the specified period or such other period as may be agreed in writing by the Government this Agreement may be terminated in accordance with clause 22 February.

[5] It is not in dispute that the respondent had failed to fulfil the condition precedent.

[6] Nine years later, the appellants terminated the agreement through a letter dated 20 August 2013. The appellants informed the respondent that the agreement is unenforceable and no longer binding on the parties as the respondent had failed to fulfil the condition precedent.

[7] The respondent disputed the termination and wrote a letter to the appellants dated 3 November 2014 requesting the formation of a dispute resolution committee under cl 27 of the agreement to settle the dispute through arbitration. However, the appellants through a letter dated 6 January 2015 rejected the request on reason that the agreement was no longer effective and that all the clauses therein were no longer applicable and not binding on the parties.

[8] The procedure for appointing an arbitrator is specifically provided in cl 28.2 of the agreement and it reads as follows:

> 28.2 Any matter, dispute or claim referred to arbitration pursuant to clause 28.1 shall be referred to an arbitrator to be agreed by the relevant parties or, failing agreement, to be nominated on the application of any of the relevant parties by the Director of Regional Centre for Arbitration in Kuala Lumpur ...

[9] The respondent's solicitor then wrote a letter dated 12 December 2016 to the appellants to refer the dispute to arbitral tribunal and proposed Encik Ameir bin Hassan as sole arbitrator. There was no reply by the appellants to the said letter.

[10] Therefore, in default of parties' agreement on an arbitrator, the mechanics of cl 28.2 would require any party to make an application to the Director of AIAC for the nomination of the arbitrator.

[11] It is an undisputed fact that no reference was made to the KLRCA in respect of the nomination of an arbitrator.

[12] Instead, on 13 February 2017, the respondent filed Originating Summons No 24 NCVC-23–02 of 2017 at Kangar High Court, Perlis ('Kangar first OS') applying for an order to refer the dispute to arbitral tribunal and to appoint En Ameir bin Hassan as sole arbitrator. The appellants did not file affidavit in reply. On 21 April 2017, the learned judicial commissioner ('JC') allowed the respondent's application ('Kangar first order'). The appellants did not appeal against the Kangar first order.

[13] The first arbitral meeting was held on 15 August 2017 wherein the arbitrator fixed the hearing dates from 12 February 2018 to 16 February 2018. Both parties filed their respective pleadings, bundle of documents and witness statements in preparation for the hearing.

[14] However, on 30 January 2018, the appellants filed Originating Summons No WA-24 NCVC-195–01 of 2018 at the Kuala Lumpur High Court ('KL first OS') and applied for the following orders:

(a) declaration that the arbitral proceeding contravenes clause 28 of the agreement;

(b) declaration that the Kangar first order appointing Encik Ameir bin Hassan as the arbitrator is null and void;

(c) that the Kangar first order be set aside; and

(d) that all arbitral proceeding be stayed pending disposal of the KL first OS.

[15] On 14 March 2018, the Kuala Lumpur High Court judge allowed the appellants' application ('KL order') and the arbitral proceeding was put to a stop.

[16] The respondent then filed Originating Summons No RA-24C (ARB)-2–03 of 2018 at the Kangar High Court ('Kangar second OS') applying for the following orders:

(a) declaration that the KL order contravenes ss 8, 14, 15, 18, 23 and 34 of the Arbitration Act 2005 and void; and

(b) that the KL order be set aside.

[17] On 26 April 2018, the Kangar High Court allowed the respondent's application ('Kangar second order'). The appellants appealed against the Kangar second order to the Court of Appeal. The appeal was dismissed on 8 November 2018. There was no further appeal by the appellants.

[18] The appellants and the respondent proceeded with the arbitral proceeding wherein on 9 August 2019, the arbitrator issued a final award in favour of the respondent.

[19] In the final award, the arbitrator held, inter alia:

(a) that the condition precedent was waived and not binding on both parties;

(b) that the termination of the said agreement due to the non-compliance of the condition precedent is unlawful;

(c) allowing the respondent's claim as follows:

	CLAIM		AMOUNT
(i)	Loss of profit	—	RM144,730,780
(ii)	Miscellaneous cost incurred	—	RM100,000
(iii)	Punitive and Exemplary Damages	—	RM1,000,000
	Total	—	RM145,830,780

[20] Aggrieved by the said final award, the appellants applied via Originating Summons No WA-24 NCC (ARB)-45–10 of 2019 at the Kuala Lumpur High Court (KL second OS) to set aside the final award under s 37 of the Arbitration Act 2005 ('the Act') on the following grounds:

(a) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration;

(b) the composition of the arbitral tribunal was not in accordance with the agreement of the parties; and

(c) the award is in conflict with the public policy of Malaysia.

HIGH COURT DECISION

[21] On the issue of the composition of the arbitral tribunal, the learned High Court judge decided that in view of the implicit acceptance by the court in the second Kangar OS of the fact that the appointment of the arbitrator was indeed contrary to the agreement of the parties, Her Ladyship took the view that special circumstances exist as to why the doctrine of res judicata in the wider sense should not apply in the present case. Despite this ruling, the learned judge finds the failure of the plaintiffs to raise the issue of the composition of the arbitral tribunal pursuant to s 18 of the Act constitutes a waiver of the right to raise the issue that the composition of the arbitral tribunal is not in accordance with the agreement of the parties.

[22] On the issue of public policy, the learned judge found the plaintiffs have failed to prove the final award is in conflict with public policy.

[23] As the claim for miscellaneous expenses was not pleaded, the nominal award of RM100,000 by the arbitrator was set aside for not falling within the terms of submission to the arbitration.

[24] Save and except for setting aside the award of RM100,000 the appellants' claim was dismissed.

THE ISSUES

[25] The appellants raised three issues in this appeal:

(a) whether the issue on the appointment of the arbitrator is res judicata;

(b) whether the learned High Court judge has erred in holding that the appellants have waived the right to challenge the arbitral tribunal's composition because the appellants did not raise the said issue before the arbitrator under s 18 of the Arbitration 2005; and

(c) whether the learned High Court judge has erred in holding the appellants have failed to prove that the final award is in conflict with public policy.

First issue

[26] The appellants submit that the appointment of the arbitrator and the composition of the arbitral tribunal was in contravention of cl 28.2 of the privatisation agreement. It is also submitted that the issue on the appointment of the arbitrator and the composition of the arbitral tribunal was not res

judicata because there was never any determination made pertaining to the composition of the arbitral tribunal under cl 28.2 of the agreement in all the previous suits and appeal.

[27] In response, the respondent submit that the issue on the appointment of En Ameir bin Hassan as the arbitrator is res judicata in the sense that the fact has been finally decided and the appellants cannot relitigate the same issue in other proceeding; see *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189; *Dato' Sivananthan a/l Shanmugam v Artisan Fokus Sdn Bhd* [2016] 3 MLJ 122; [2015] 2 CLJ 1062. The facts giving rise to res judicata are as follows:

(a) the application to appoint En Ameir bin Hassan as arbitrator was made in the Kangar first OS. Therefore, any issue pertaining to the appointment should be raised in the Kangar first OS. But, the appellants did not file affidavit in reply. In other words, the appellants elected not to participate in the Kangar first OS. When the Kangar High Court allowed the respondent's application on 21 April 2017 ('Kangar first order'), the appellants did not appeal against the decision;

(b) instead, the appellants challenged the appointment of the arbitrator via KL first OS on the ground the appointment contravened clause 28.2 of the agreement and s 13(6) and (7) of the Arbitration Act 2005 ('the Act'). The legality issue on the appointment was raised and argued by the appellants in KL first OS and was accepted by the KL High Court. On 14 March 2018, the KL High Court set aside the Kangar first order ('KL order');

(c) in retaliation, the respondent applied to set aside the KL order via Kangar second OS. Again the appellants raised and argued the legality issue of Kangar first order. 26 April 2018, the Kangar High Court allowed the respondent's application ('Kangar second order');

(d) aggrieved, the appellants appealed against the Kangar second order to the Court of Appeal.

Again, the appellants argued on the legality of the arbitrator's appointment by the Kangar High Court. The appellants' appeal was dismissed by the Court of Appeal. There was no further appeal by the appellants. This means the appellants have accepted the decision in the Kangar second OS; and

(e) the decision in the Kangar second OS means the Kangar first order appointing En Ameir bin Hassan as arbitrator remain intact, valid, final and binding on the parties.

[28] Based on the background facts, we agree with the respondent that the issue on legality of the arbitrator's appointment is res judicata. The appellants

had raised and argued the appointment issue three times ie in the KL first OS, the Kangar second OS and in the Court of Appeal. We find no merit in the appellants' contention that in all these previous suit, the court never determined the issue that the arbitrator's appointment was not in accordance with cl 28.2 of the agreement. To the contrary, we find contravention of cl 28.2 of the agreement formed the foundation of the appellants' application to set aside the Kangar first order.

[29] After the final award was issued, the appellants filed KL second OS to set aside the final award. Again, for the fourth time, the appellants raised the issue on the arbitrator's appointment giving the same reason that was raised in the KL first OS, Kangar second OS and in the Court of Appeal.

[30] At paras 25, 29, 30, 34 and 35 of the judgment, the learned High Court judge ruled that the appointment and the composition of the arbitral tribunal was not res judicata based on the following:

(i) It was implicitly accepted by the Judicial Commissioner ('JC') in Kangar second OS that the appointment of the arbitrator was contrary to the agreement.

(ii) The appellants were precluded from raising the issue of law during Kangar first OS.

(iii) The appellants' Notice of Application to strike out Kangar first OS was not heard.

(iv) The appellants had tried to raise the issue in their striking out application but the court did not allow the appellants to be heard first. The appellants were not to blame for not being able to raise this issue in the Kangar first OS and because of that the doctrine of res judicata in the wider sense should not apply.

[31] The respondent submit the learned High Court judge has erred in deciding res judicata does not apply for the following reasons. First, it is submitted that it is not true that the learned JC in Kangar second OS had agreed that the arbitrator's appointment was not in accordance with the agreement. The learned JC was merely quoting the reason given by the KL High Court in setting aside the Kangar first order. It is obvious that paras 19 and 20 of the learned JC's grounds of judgment referred to by the learned High Court judge to justify her decision that res judicata does not apply was misconstrued by the learned High Court judge.

[32] The second reason is the notice of application for striking out was not served on the respondent and was abandoned by the appellants. So, there was no issue of the appellants being denied an opportunity to raise the issue. Thirdly, the notice of application was not pleaded in the KL second OS but

raised by the appellants during clarification on 30 January 2020. However, the learned High Court judge still proceeded with the non-pleaded notice of application and used it to justify her decision that the issue of the appointment of the arbitrator is not res judicata. It is submitted that parties are bound by their pleadings and the court is not entitled to decide a suit on a matter that is not pleaded. In support of that proposition, the respondent cited *Instantcolor System Sdn Bhd v Inkmaker Asia Pacific Sdn Bhd* [2017] 2 MLJ 697 wherein the Federal Court held that cases must be decided on the issue on the record.

[33] In *Aseambankers Malaysia Bhd & Ors v Shencourt Sdn Bhd & Anor* [2014] 4 MLJ 619; [2014] 2 CLJ 773, the Court of Appeal held that the court is not entitled to decide a suit on a matter that is not pleaded. And when the trial court decides on an issue that is not pleaded, the judgment can be set aside.

[34] We have perused the KL second OS and find the notice of application was indeed not pleaded. On the authority of *Aseambankers Malaysia Bhd & Ors v Shencourt Sdn Bhd & Anor* [2014] 4 MLJ 619; [2014] 2 CLJ 773, we agree with the respondent that the learned High Court judge had acted beyond her jurisdiction by deciding on matter that was not pleaded. Therefore, Her Ladyship's decision that res judicata does not apply on the issue of the arbitrator's appointment is an error of law and is set aside.

Second issue

[35] During the hearing of the KL second OS to set aside the final award, the appellants raised the issue that the composition of the arbitral tribunal was not in accordance with the agreement of the parties. But this issue was not raised in the arbitral proceedings. It is a disputed fact that the appellants had submitted and participated in the arbitral proceeding until the final award was issued without raising any objection over the appointment of the arbitrator.

[36] Section 18(1) of the Arbitration Act 2005 provides:

> Competence of arbitral tribunal to rule on its jurisdiction 18(1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement.

[37] In *Press Metal Sarawak Sdn Bhd v Etiqa Takaful Bhd* [2016] 5 MLJ 417, the Federal Court held:

> [40] A challenge to the jurisdiction of an arbitrator must be made during the arbitration proceedings itself, but not at the court hearing an application for a stay under s 10(1). It is the arbitrator who decides the issue of jurisdiction. Any ruling of the arbitration that it has jurisdiction can be appealed to the High Court which will finally decide the matter.

[38] The appellants took the position that since the arbitrator's appointment was not made in accordance with the provisions of the law, his appointment is a nullity and the arbitrator himself is not competent to conduct the arbitral proceedings. In the circumstances, the appellants submit that the court cannot invoke s 18(1) of the Act when the foundation of the arbitration proceedings itself is null and void.

[39] The respondent submits that the failure of the appellants to state their objection to the composition of the arbitral tribunal not complying with the agreement before the arbitrator constitutes a waiver of rights to object as provided under s 7 of the Act which reads:

> 7 Waiver of right to object
>
> A party who knows:
>
> (a) of any provision of this Act from which the parties may derogate; or
>
> (b) that any requirement under the arbitration agreement has not been complied with, and yet proceeds with the arbitration without stating its objection to such non-compliance without undue delay or, if a time limit is provided for stating that objection, within that period of time, shall be deemed to have waived its right to object.

[40] We disagree with the appellants' submission. The law is trite. Any objection pertaining to the arbitrator's appointment and his jurisdiction must be raised before the arbitrator. The High Court in Kangar second OS has held that any challenge to the arbitrator's jurisdiction must be made before the arbitrator under s 18(1) of the Act. The decision in the Kangar second OS was upheld by the Court of Appeal.

[41] The learned High Court judge in the KL second OS agree with the respondent that the appellants' failure to raise any objection before the arbitrator under s 18(1) of the Act constitutes a waiver of its rights to object to the jurisdiction of the arbitrator in the application to aside the final award. Her Ladyship's decision is stated in paras 48, 49 and 51 of the judgment as follows:

> 48. Since the decision in the second Kangar OS was upheld by the COA, it must be accepted that the COA agreed with the High Court that any challenge to the jurisdiction of an arbitrator must be made before the arbitrator as provided under s 18(1) of the Act. Since the plaintiffs did not challenge the jurisdiction of the arbitrator pursuant to s 18(1) of the Act, they must be deemed to have waived their right to challenge the jurisdiction of the arbitrator. It is a fact that KL OS was only filed 284 days after the Kangar first order and 12 days before the hearing of the arbitration.
>
> 49. In the circumstances, I agree that the failure of the plaintiffs to raise the issue of the composition of the a rbitral tribunal pursuant to s 18 of the Act constitutes a waiver of the right to raise that issue in proceeding to set aside the arbitral award.

51. Accordingly, I am of the view that the plaintiffs have waived the right to set aside the arbitral award by raising the issue that the composition of the arbitral tribunal is not in accordance with the agreement of the parties.

[42] On the facts and the law, it is clear to us that the appellants had not complied with ss 7 and 18(1) of the Act ie to raise any objection before the arbitrator. Therefore, we find the learned High Court judge did not err in deciding that due to the non-compliance with these provisions of the Act, the appellants had waived their right to object on the arbitrator's jurisdiction in the KL second OS. Accordingly, we find no merit in the second issue and the appeal on this ground must fail.

Third issue

[43] The appellants applied to set aside the final award under s 37(1)(b)(ii) of the Act which reads:

37(2) Without limiting the generality of subparagraph (1) (b) (ii), an award is in conflict with the public policy of Malaysia where —

(b) a breach of the rules of natural justice occurred —

(i) during the arbitral proceedings; or

(ii) in connection with the making of the award.

[44] The term 'public policy' in the context of the Act has been discussed in detail by the Federal Court in the case of *Jan De Nul (Malaysia) Sdn Bhd & Anor v Vincent Tan Chee Yioun & Anor and other cases* [2016] MLJU 914; [2019] 1 CLJ 1. The principles that can be distilled from the said case are as follows:

(i) 'Public Policy' are matters concerning public good and public interest;

(ii) To succeed in setting aside the award that was in conflict with the public policy of Malaysia, the applicant must show that the most basic notions of morality and justice would be offended by the award and that the conflict is injurious to the public good in Malaysia.

(iii) The concept of public policy under s 37 of the AA 2005 for the purpose of setting aside an award ought to be read narrowly and more restrictively. The court's intervention should be sparingly used. The court must be compelled that a strong case has been made out that the arbitral award conflicts with the public policy of Malaysia.

(iv) Patent injustice, manifestly unlawful and unconscionable, substantial injustice, serious irregularity and other similar serious flaws in the arbitral process and award are instances where the upholding of the award is injurious to the public good and is in conflict of public policy in Malaysia.

[45] In this case, the appellants had admitted that there was no breach of natural justice during the arbitral proceeding or in connection with the making of the award. This admission is stated in para 35 of the appellants' written submission at p 2320 in encl 21. For ease of reference, we reproduced para 35 below:

> 35. It must be clarified at the outset that it is not our contention that the breach of rules of natural justice occurred during the arbitral proceedings or in connection with the making of the award as provided under section 37(2)(b) of the Act.

[46] However, the appellants alleged the final award is in conflict with public policy due to the following reasons:

(i) There was serious irregularity in the final award as it was issued by the arbitrator that was not appointed in accordance with cl 28.2 of the agreement.

(ii) It was patent injustice in the arbitrator's finding that the private lands were rejected by the plaintiffs (appellants) on 14 April 2005 which is in conflict with his other finding that CW1 agreed that as at May 2005 there was no agreement or instruction to vary the terms of the agreement.

(iii) It was patent injustice in the arbitrator's finding that the respondent was instructed by the appellants to look for alternative site and the respondent proposed Lot 284 as it was not supported by any evidence and in conflict with the respondent's own letter dated 18.5.2005 stating their difficulty to comply with the condition precedent.

(iv) It was manifestly unlawful and unconscionable in the arbitrator's finding that the condition precedent had been waived because the condition precedent was never complied with within the agreed period that caused the agreement to be terminated.

(v) The decision of the arbitrator that there was unlawful termination is substantial injustice.

[47] The very same reasonings in para [41] above were raised and argued before the High Court and which the learned judge summed up as the appellants saying that the final award is manifestly erroneous because the arbitrator had misconstrued the facts of the case and made a wrong decision. It cannot be denied that the findings made by the arbitrator to which the appellants had labelled them as patent injustice, manifestly unlawful and unconscionable and substantial injustice are actually finding of facts. It is trite law that arbitrator is the master of facts and that the court has no jurisdiction to set aside an award on the ground of error of fact or law on the face of the award.

[48] In *Far East Holdings Bhd & Anor v Majlis Ugama Islam dan Adat Resam Melayu Pahang and other appeals* [2018] 1 MLJ 1; [2018] 1 CLJ 693, the

Federal Court held :

> [115] ... Error of fact or law on the face of the award 'is not prescribed as a ground for court intervention. Hence, under AA 2005, there is no jurisdiction to set aside an award on the ground of 'error of fact or law on the face of the award.
>
> [153] Where it is a question of fact, 'The arbitrators remain the masters of the facts. On an appeal the court must decide any questions of law arising from the award on the basis of full and unqualified acceptance of the findings of fact of the arbitrators. It is irrelevant whether the court considers these findings to be right or wrong. It also does not matter how obvious a mistake by the arbitrators on issues of fact might be or what the scale of the financial correspondence of the mistake of fact might be.

[49] After considering the facts and the law, the learned High Court judge found that the appellants have not satisfied the criterion of 'conflict with public policy'. Therefore, the application to set aside the final award based on the ground of conflict with public policy was dismissed.

[50] We find the learned High Court judge had not erred in Her Ladyship's finding that the element of 'conflict with public policy' was not satisfied in this case. As rightly submitted by the respondent, we find the appellants have failed to explain in what way the final award is said to create patent or substantial injustice or is manifestly unlawful and unconscionable to the extent of conflicting against the public policy in Malaysia. We also find the appellants have failed to prove that the most basic notions of morality and justice would be offended by the award and that the conflict is something injurious to the public good in Malaysia. For these reasons, we find no merit in the third issue raised by the appellants.

OUR DECISION

[51] There is no merit in the appellants' appeal. The appeal is therefore dismissed.

Appeal dismissed.

Reported by Muhamad Azham Marwan